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SUPREME COURT, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 449

ROBERT M. BRAKE,

Petitioner

vs.

DON SHOEMAKER, THE MIAMI HERALD PUBLISHING COMPANY, a Florida corporation and FRED SHERMAN,

Respondents

PETITIONER'S REPLY BRIEF

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In their brief Respondents have ignored the questions and arguments posed in the Petition and have raised two new issues. Neither of these two new issues is pertinent to the case at bar.

1. *Was the Petition timely filed?*

On pages 20 and 21 of their brief Respondents argue that the Petition was not filed within 90 days from the date of the filing of the opinion of the District Court of Appeal, Third District of Florida. They admit that a timely petition for Writ of Certiorari was filed in the Supreme Court of Florida under Article V Section 4(2) of the Florida Constitution, which permits that Court to issue such writs to review any decision of a District Court of Appeal

> "... that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law..."

The Petition filed in this Court shows that Petitioner asserts that the decision of the District Court of Appeal was in conflict with such Florida cases as *Hevey vs. News Journal Corporation,* 148 So. 2d 543; *Stewart vs. Codrington,* 54 Fla. 327, 45 So. 809; and *Caldwell vs. Personal Finance Co.,* 46 So. 2d 726. Therefore it was necessary for Petitioner to file a Petition for Writ of Certiorari with the Florida Supreme Court in order to exhaust his State remedies, *Stratton vs. Stratton,* 239 U.S. 55, 36 S.Ct. 26, 60 L.Ed. 142 even though the jurisdiction of the Florida Supreme

Court was discretionary, *Andrews vs. Virginian R.Co.*, 248 U.S. 272, 39 S.Ct. 101, 63 L.Ed. 236, since it is

> "... the existence of the power, and not the considerations moving to its exercise (which is) the criterion by which to determine whether the judgment of the trial court was final..."
> (39 S.Ct. at 102).

In such cases the time for filing a Petition in this Court runs from the date when the Writ of Certiorari was refused by the Florida Supreme Court. *American Railway Express Co. vs. Levee*, 263 U.S. 19, 44 S.Ct. 11, 68 L.Ed. 140. Since it is admitted that the Petition was filed only 51 days after the Supreme Court of Florida refused the Writ of Certiorari the present Petition with this Court was timely filed.

See also *Chicago & E.I.R. Co. vs. Industrial Commission of Illinois et al*, 284 U.S. 293, 52 S.Ct. 151, 76 L.Ed. 305; *Adam vs. Saenger et al*, 303 U.S. 61, 58 S.Ct. 456, 82 L.Ed. 651; *Brown vs. Western Ry of Alabama*, 338 U.S. 296, 70 S.Ct. 107, 94 L.E. 102; *Virginian Ry Co. vs. Mullins*, 271 U.S. 220, 46 S.Ct. 526, 70 L.Ed. 915; *Michigan Wisconsin Pipe Line Co. vs. Calvert*, 347 U.S. 157, 74 S.Ct. 396, 98 L.Ed. 583.

2. *Did the Court below rule on the Federal question of malice under the First Amendment to the United States Constitution, or did it decide this case solely on the State question of the libelous nature of the language used?*

Respondents devote the remainder of their brief to an assertion that the Court below might have decided this case on the narrow question of whether the language used was libelous. The opinion of the Third District Court of Appeal of Florida, set forth on pages 21 and 22 of the Appendix to the Petition, shows that sole reason given for the decision was the

> "... authority of *New York Times Co. vs. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686. See also *Curtis Publishing Company vs. Butts,* ____U.S.____, 18 L.Ed. 2d 1094, 87 S.Ct.____."

The two cited cases do not deal with the question of whether language is libelous. They treat only the question of the legal standard of malice under the First Amendment. Therefore the ruling of the Court below was solely on the ground that the Complaint, as amended, did not sufficiently allege malice as required by these decisions. To review this question, so that the law can be settled on this point, this Petition has been filed.

Respectfully submitted,

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